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8
9 UNITED STATES DISTRICT COURT
10
11 SOUTHERN DISTRICT OF CALIFORNIA

12 UNITE EUROTHERAPY, INC., a
California corporation,

13 Plaintiff,

14 v.

15 WALGREEN CO., an Illinois
Corporation, WALGREENS.COM, INC.,
an Illinois Corporation; DOES 1-10

16 Defendants.

17 Case No. 3:16-CV-01706-BTM-JMA

18 **UNITE EUROTHERAPY, INC.'S
OPPOSITION TO MOTION TO
DISMISS PURSUANT TO
FED.R.CIV. 12(B)(6) [DKT. 14]**

19 Date: October 21, 2016
20 Time: 11:00 a.m.

21 The Honorable Barry Ted Moskowitz

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1 Plaintiff Unite Eurotherapy, Inc. submits this Opposition to the motion of
2 Defendants Walgreen Co. and Walgreens.com, Inc. (together, “Walgreens”) to
3 dismiss all of the claims brought by Unite in its First Amended Complaint (“FAC”).
4 The claims include:

- 5 1. Intentional interference with contractual relations; and
6 2. Unfair competition pursuant to the Lanham Act (15 U.S.C. §1125),
7 common law, and Cal. Bus. & Prof. Code §17200 *et seq.*

8 Walgreens was insistent on burdening Unite and this Court with an
9 irresponsible pleadings challenge. It brought this Motion even though it had to
10 violate almost every cardinal rule of a Fed. R. Civ. P. 12(b)(6) challenge, including:
11 (1) narrowly reading and misreading the allegations, (2) drawing inferences (and
12 unreasonable ones at that) in its favor instead of Unite’s, and (3) outright ignoring the
13 portions of the FAC and Exhibits that did not suit the purposes of its arguments.
14 Unite properly pled facts plausibly supporting every element of each claim.
15 Walgreens’ Motion to Dismiss should be denied.

16 **I. FACTUAL BACKGROUND**

17 **A. The Universal Distribution Agreement Prohibits Online Sales by the
18 Distributor, and Sales to Any Reseller Who Has Not Agreed to the
Same Prohibition or Has Breached the Prohibition**

19 Unite develops and sells boutique hair care products under the federally-
20 trademarked UNITE brand. FAC ¶¶ 7-8. Unite spends significant resources testing
21 and researching its products to ensure superior performance, and restricts distribution
22 of its products. *Id.* ¶¶ 7, 9. Specifically, Unite contracts with every single reseller of
23 its products to limit sales to specific channels and prevent unauthorized online sales.
24 *Id.* ¶ 10-11. Unite places these strict controls on its products to develop and maintain
25 its brand image, ensure the quality of its products, and provide customers with
26 product education and support. *Id.* ¶ 14.

27 Unite carefully limits sales of its professional hair care products to two
28 mediums: (1) authorized resellers, and (2) Unite’s proprietary website. FAC ¶¶ 9, 12.

1 This fosters its recognized image of quality and ensures customer support. *Id.* ¶ 14.
 2 These strict controls also protect the quality of Unite's products. *Id.* ¶ 13. To
 3 safeguard its goodwill and reputation, Unite requires that all of its authorized resellers
 4 sign and abide by a Distribution Agreement that, among other things, put in place
 5 absolute prohibitions on selling Unite products online – whether by the distributor
 6 itself or by resellers who purchase from the distributor. *Id.* ¶¶ 9, 10.

7 Specifically, the Distribution Agreement places strict limits on who the
 8 distributors may sell to. The distributors are not permitted to sell Unite products
 9 through “excluded channels” which include “online or internet channels, beauty
 10 supply stores, salons or retailers that dedicate less than 50% of the square footage in
 11 any facility to performing hair services, and any business that does not perform
 12 professional, non-discount hair services.” *Id.* ¶ 10, Ex. 3 at 1.

13 In addition, the Distribution Agreement requires each distributor to have a form
 14 Anti-Diversion Agreement signed by any resellers it is selling to (which would
 15 include Walgreens). FAC ¶ 11, Ex. 3 at ¶ 2.8. “Distributor will not distribute any
 16 Product to any customer or account (“Account”) unless and until such Account has
 17 executed Unite’s most current form of anti-diversion agreement as Unite may provide
 18 Distributor from time to time, the current form of which is attached hereto (“Anti-
 19 Diversion Agreement”)… Distributor may not modify the terms of the Anti-
 20 Diversion Agreement and will not distribute Products to Accounts that have not
 21 signed the Anti-Diversion Agreement or have breached the Anti-Diversion
 22 Agreement, and Distributor will enforce Anti-Diversion Agreements against any
 23 Account in breach (or alleged breach) thereof.” *Id.*

24 In turn, the Anti-Diversion Agreement prohibits resellers from selling Unite
 25 products in bulk, or to “any diverter or redistributors of products or to any other
 26 person or entity reasonably believed to be purchasing [Unite products] for subsequent
 27 resale.” *Id.* The Anti-Diversion Agreement also states that the reseller “will not sell
 28

1 product on the internet, catalog sales or other distance selling.” FAC Ex. 3 at p. 16
 2 ¶3. Thus, the Distribution Agreement requires that distributors cannot get around
 3 online sales by selling to a reseller for their online sales. Instead, distributors must
 4 ensure that their entire distribution chain – no matter how many resellers are
 5 introduced into it – has the online sales prohibition in place, and that they will not
 6 further sell to resellers who violate this prohibition.

7 **B. Walgreens’ Online Sales of Unite Products and the Notices that**
Walgreens Received and Disregarded

9 Despite Unite’s tight contractual controls with its distributors, Unite discovered
 10 that Walgreens was and is impermissibly selling Unite products online. Almost all
 11 attempted returns of Unite products are attributable to unauthorized online sales –
 12 those products tend to be older and have lost much of their quality. *Id.* ¶ 13. These
 13 issues are present with the older Unite products that Walgreens is impermissibly
 14 selling online. *Id.* ¶ 17-18.

15 Over the course of a half year, Unite sent Walgreens three letters repeatedly
 16 informing Walgreens of its restrictive contracts with resellers and demanding that
 17 Walgreens stop its unauthorized online sales (*Id.* ¶ 23):

- 18 • Aug. 11, 2015 Letter: “Unite’s products are exclusively sold through
 19 certain distinct channels. Sellers of Unite’s products contractually agree
 not to sell those products over the internet.” FAC Ex. 4.
- 20 • October 19, 2015 Letter: “Walgreens has been on notice since at least
 21 August 11, 2015 that Unite’s re-sellers have a contractual obligation to
 not sell Unite’s products online. Walgreens therefore continues to
 22 intentionally interfere with Unite’s contracts each time it purchases more
 Unite products by diverting product from salons through its continuing
 23 unauthorized online sales.” FAC Ex. 5.
- 24 • February 22, 2016 Letter: “As a reminder, Walgreens has been on notice
 25 since at least August 11, 2015 that Unite’s re-sellers have a contractual
 obligation to not sell Unite’s products online. Walgreens continues to
 26 intentionally interfere with Unite’s contracts each time it purchases more
 Unite products by diverting product from salons through its continuing
 27 unauthorized online sales.” FAC Ex. 5.
- 28

1 Unite products by diverting product from salons through its continuing
 2 unauthorized online sales.” FAC Ex. 6.

3 Despite each of these unequivocal demands, Walgreens did not cease the
 4 unauthorized online offering and sale of Unite products it obtained from a distributor
 5 in violation of the distributor’s contractual restrictions. FAC ¶ 18. Rather than
 6 comply with the demands, Walgreens has continued to “interfere with UNITE’s
 7 reseller relationships and Distribution Agreements by purchasing from resellers to
 8 sell such products online at walgreens.com.” *Id.* ¶ 23. As of September 14, 2016,
 9 Walgreens is selling 15 SKUs of Unite products. *Id.* ¶¶ 18, 23.

10 Walgreens’ unlawful actions have seriously harmed Unite. Unite’s resellers
 11 are complaining and ceasing sales of Unite products because they found out that
 12 Walgreens is selling those products online. *Id.* ¶ 19. Numerous Unite clients are
 13 threatening to drop the Unite brand because Unite products are available on
 14 Walgreens’ website. *Id.* And Walgreens is diluting the value of the UNITE brand.
 15 *Id.* ¶¶35-36.

16 II. STANDARD OF REVIEW

17 When deciding whether to dismiss a claim under Fed. R. Civ. P. 12(b)(6), the
 18 court must take the claimant’s allegations as true and draw all reasonable inferences
 19 in the claimant’s favor. *Retail Prop. Trust v. United Bhd. of Carpenters & Joiners of*
 20 *Am.*, 768 F.3d 938, 945 (9th Cir. 2014). To succeed on a Rule 12(b)(6) motion, the
 21 movant must show either a “lack of a cognizable legal theory” or “the absence of
 22 sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police*
 23 *Dept.*, 901 F.2d 696, 699 (9th Cir. 1988).

24 In contrast, to survive a Rule 12(b)(6) motion, a complaint need not contain
 25 detailed factual allegations; rather, it need only plead “enough facts to state a claim to
 26 relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570
 27 (2007)). Dismissal is only appropriate if the complaint “fail[s] *in toto* to render

1 plaintiffs' entitlement to relief plausible." *Id.* at 569 n.14.

2 This standard considers whether "the complaint fails to state enough facts to
 3 raise a reasonable expectation that discovery will reveal evidence of the matter
 4 complained of, or if the complaint lacks a cognizable legal theory under which relief
 5 may be granted." *U.S. Med. Instruments, Inc. v. CFS N. Am., Inc.*, No. 13-cv-349-
 6 BEN (DHB), 2013 U.S. Dist. LEXIS 162564, at *4 (S.D. Cal. Nov. 12, 2013).

7 Thus, as long as "Plaintiff's claims [] 'raise a right to relief above the
 8 speculative level on the assumption that all the allegations in the complaint are true
 9 (even if doubtful in fact)," the motion to dismiss should be denied. *Nordstrom v. U.S.*
 10 *Bank, N.A., Inc.*, No. 11-cv-1554 BEN (KSC), 2012 U.S. Dist. LEXIS 102267, at *5-
 11 6 (S.D. Cal. July 18, 2012) (*quoting Twombly*, 550 U.S. at 555).

12 **III. ARGUMENT**

13 **A. Unite Sufficiently Pled Intentional Interference With Contractual
 14 Relations**

15 Unite pled detailed facts to support each element of its intentional interference
 16 with contractual relations claim. A claim for intentional interference with contractual
 17 relations contains five elements, all of which Unite properly alleged:

18 The elements which a plaintiff must plead to state the cause of
 19 action for intentional interference with contractual relations are
 20 (1) a valid contract between plaintiff and a third party; (2)
 21 defendant's knowledge of this contract; (3) defendant's
 22 intentional acts designed to induce a breach [or] disruption of
 23 the contractual relationship; (4) actual breach or disruption of
 24 the contractual relationship; and (5) resulting damage.

25 *Celebrity Chefs Tour, LLC v. Macy's, Inc.*, 16 F. Supp. 3d 1141, 1157 (S.D.
 26 Cal. 2014) (*quoting Quelimane Co. v. Stewart Title Guar. Co.*, 19 Cal. 4th
 27 26 (1998) (*quoting Pac. Gas & Elec. Co. v. Bear Stearns & Co.*, 50 Cal. 3d
 28 1118, 1126, (1990)).

29 The intentional interference claim as alleged meets the *Twombly* standard.

1 **1. Valid Contract Between Plaintiff and a Third Party**

2 Unite attached to its amended complaint as Exhibit 3 the form of the
 3 Distribution Agreement signed by all authorized resellers since 2010. FAC ¶¶11.
 4 Because every reseller since 2010 has signed this form Distribution Agreement, Unite
 5 has plausibly pled the valid contract between itself and the third party. Although
 6 Walgreens has refused to disclose the name of the reseller it uses, discovery will
 7 reveal which of the Unite resellers are selling to Walgreens, at which point that
 8 reseller can also be added to this case.

9 Unite carefully limits sales of its professional hair care products to two
 10 mediums: (1) authorized resellers, and (2) Unite's proprietary website. FAC ¶¶ 9, 12.
 11 The material terms of the form Distribution Agreement signed by each Unite reseller
 12 have been attached to the Complaint and alleged. *Id.* ¶¶ 10-11. The reseller agrees
 13 not to sell online, and agrees to obtain an executed version of Unite's Anti-Diversion
 14 Agreement from any subsequent reseller prior to selling to them (which includes a
 15 prohibition of online sales). FAC ¶¶ 10-11 & Ex. 3 at 1, 16-17.

16 Unite has pled the relevant terms of the Distribution Agreement, and no
 17 suggestion has been made as to why the pled Distribution Agreement is not a valid
 18 agreement between Unite and a third party. Therefore, Unite has sufficiently alleged
 19 a valid contract between itself and a third party.^{1/}

20 **2. Walgreens Knew About the Contract**

21 Walgreens may not have known it was interfering with Unite's distributor
 22 agreements initially (giving Walgreens the benefit of the doubt), but the demand
 23 letters removed any such ignorance long ago. FAC ¶¶ 15, 23. The first letter told

25 ^{1/}Walgreens' argument about the date on Exhibit 3, the form Distribution Agreement,
 26 fails to be persuasive, and more importantly, is improper in this motion. Walgreen
 27 MTD at 5-6. The allegations state this Distribution Agreement form is the same one
 28 that has been used since 2010. FAC ¶¶ 10-11. There is nothing inconsistent about
 attaching an example of the form that happens to have a more recent date. This is but
 an example of Walgreens stating speculative inferences, and refusing to draw all
 reasonable inferences in Unite's favor.

1 Walgreens about the contractual obligations of the Unite resellers, and the second and
 2 third letter reiterated the contracts, and expressly told Walgreens its purchases for
 3 online sales were interfering with those contracts:

- 4 • Aug. 11, 2015 Letter: “Unite’s products are exclusively sold through
 certain distinct channels. Sellers of Unite’s products contractually agree
 not to sell those products over the internet.” FAC Ex. 4.
- 5 • October 19, 2015 Letter: “Walgreens has been on notice since at least
 August 11, 2015 that Unite’s re-sellers have a contractual obligation to
 not sell Unite’s products online. Walgreens therefore continues to
 intentionally interfere with Unite’s contracts each time it purchases more
 Unite products by diverting product from salons through its continuing
 unauthorized online sales.” FAC Ex. 5.
- 6 • February 22, 2016 Letter: “As a reminder, Walgreens has been on notice
 since at least August 11, 2015 that Unite’s re-sellers have a contractual
 obligation to not sell Unite’s products online. Walgreens continues to
 intentionally interfere with Unite’s contracts each time it purchases more
 Unite products by diverting product from salons through its continuing
 unauthorized online sales.” FAC Ex. 6.

13 Unite properly pled Walgreens’ knowledge of the contract between Unite and a
 14 third party. But, in another example of refusing to draw all reasonable inferences in
 15 Unite’s favor, and outright disregard of settled law, Walgreens argues that knowledge
 16 is not plausibly pled because the exact reseller was not identified in the demand
 17 letters. This argument is contrary to law.

18 Putting aside that Walgreens knows exactly who the reseller is (and Unite will
 19 find out through discovery), by virtue of the three letters Unite sent Walgreens was
 20 on notice that the entire class of Unite resellers had restrictive contracts with Unite
 21 that Walgreens was interfering with. *Sebastian Int’l, Inc. v. Russolillo*, 162 F. Supp.
 22 2d 1198, 1203-04 (C.D. Cal. 2001).

23 It is well established that knowledge of contractual relations with a class of
 24 third parties is more than sufficient for an interference claim. In *Sebastian Int’l, Inc.*
 25 *v. Russolillo*, 162 F. Supp. 2d 1198, 1203-04 (C.D. Cal. 2001), the Court explained:
 26 “Intent [to interfere] can certainly be inferred if the defendant knows that contractual
 27 relations with a third party exist, but does not know the specific identity of the

1 contractual party. . . . The Court finds . . . that the Defendants were ‘on notice’ as to
 2 the class of contracting salons and distributors with whom Sebastian has contractual
 3 relations, and that it can be reasonably inferred from such notice that Defendants had
 4 knowledge of the class of contractual relations potentially disrupted by their
 5 actions.”). Likewise, the Ninth Circuit explained in *Altera Corp. v. Clear Logic, Inc.*,
 6 424 F.3d 1079, 1092 (9th Cir. 2005) that, “When the defendant performs the act that
 7 causes the interference, the defendant need not know exactly who is a party to the
 8 contract, so long as he knows he is interfering with a contractual relationship.”

9 Thus, to overcome a pleadings challenge, Unite is not required to name
 10 individual resellers. *See, e.g., Lee Myles Associates Corp. v. Paul Rubke Enterprises,*
 11 *Inc.*, 557 F. Supp. 2d 1134, 1140-41 (S.D. Cal. 2008) (alleging interference with
 12 existing franchisees and “Area Development Representatives” sufficient to state
 13 claim); *Aagard v. Palomar Builders, Inc.*, 344 F. Supp. 2d 1211, 1219 (E.D. Cal.
 14 2004) (alleging interference with “existing customers” enough to state claim); *Janda*
 15 *v. Madera Community Hosp.*, 16 F. Supp. 2d 1181, 1189 (E.D. Cal. 1998) (alleging
 16 defendant’s tortious actions impaired economic relationships with existing patients
 17 survived motion to dismiss); *Lowell v. Mother’s Cake & Cookie Co.*, 79 Cal. App. 3d
 18 13, 19, 24 (1978) (plaintiff stated a claim by alleging the defendant intended to
 19 discourage “potential purchasers” from purchasing plaintiff’s company).

20 Even where, unlike here, more specific information must generally be pled
 21 (e.g. under Fed. R. Civ. P. 9(b)), failure to do so is excused where more specific facts
 22 are within the exclusive knowledge or control of the defendant. *E & E Co., Ltd. v.*
 23 *Kam Hing Enterprises, Inc.*, 429 F. App’x 632, 633 (Unpub. 9th Cir. 2011) (*citing*
 24 *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir. 1989)); *see*
 25 *Cortina v. Goya Foods, Inc.*, 94 F. Supp. 3d 1174, 1193 n.7 (S.D. Cal. 2015). Unite
 26 pled that Walgreens knows the identity of the Unite reseller who has been supplying
 27 Walgreens with Unite products through covert sales. FAC ¶ 16. Unite cannot be

1 required to plead a more specific identity of the reseller that Walgreens already
 2 knows, and that Unite will only be able to learn through discovery.

3 Unite has plausibly pled Walgreens' knowledge of a contract between Unite
 4 and a Unite reseller.

5 **3. Walgreens' Intentional Acts Were Designed to Induce a
 6 Breach or Disruption of Unite's Contractual Relationship**

7 Unite alleged facts showing that Walgreens acts were intentionally designed to
 8 induce a breach or disruption of Unite's contracts with its authorized resellers. This
 9 element is satisfied even where "the actor does not act for the purpose of interfering
 10 with the contract or desire it but knows that the interference is certain or substantially
 11 certain to occur as a result of his action." *Quelimane Co. v. Stewart Title Guaranty*
 12 *Co.*, 19 Cal. 4th 26, 56 (1998).

13 Pleading Walgreens' intent (which includes knowledge of interference with
 14 substantial certainty) is a low hurdle. "Malice, intent, knowledge, and other
 15 conditions of a person's mind may be alleged generally." Fed. R. Civ. P 9(b). The
 16 First Amended Complaint more than clears that hurdle.

17 Walgreens was on notice of the contractual relationship between Unite and its
 18 authorized resellers, at the very least, from the letters Unite sent. *See pp. 6-7, supra;*
 19 FAC Exs. 4, 5, 6. Walgreens' intent to interfere is specifically alleged. FAC ¶¶
 20 18,19. The last two letters to Walgreens each told it that it "continues to intentionally
 21 interfere with Unite's contracts each time it purchases more Unite products by
 22 diverting product from salons through its continuing unauthorized online sales."
 23 FAC Exs. 5-6. Walgreens is alleged to have intentionally interfered by continuing to
 24 purchase product from a distributor for online sales even after being told that its
 25 conduct was interfering with contractual relations. *Id.* ¶23.

1 Unite has plausibly pled that Walgreens intentionally interfered by continuing
 2 to purchase and sell Unite product online, despite notice that each purchase and sale
 3 interfered with Unite's contracts.²

4 **4. Actual Breach or Disruption of the Contractual Relationship**

5 Unite alleged that its authorized retailers breached contracts with Unite by
 6 supplying Walgreens with Unite products for online sale, and that Walgreens was
 7 aware of and induced these breaches. *See* FAC ¶¶ 10-11, 15, 18. The Distribution
 8 Agreement attached to the First Amended Complaint states that each distributor may
 9 not sell online, may not sell to resellers who have not agreed to sell online via the
 10 Anti-Diversion Agreement, and may not sell to resellers who have violated the online
 11 prohibition in the Anti-Diversion Agreement. FAC Ex. 3 at 1, 3, 15-16.

12 There is no question that Walgreens purchasing from a distributor who was
 13 contractually prohibited from selling to Walgreens is a plausible allegation of breach
 14 or disruption of Unite's contractual relationship.

15 **5. Resulting Damage**

16 Unite's damages allegations are anything but vague and conclusory. It is
 17 enough that Unite has pled it has suffered damages, and that the damages are
 18 ongoing. FAC ¶ 19.

19 But Unite went even further and plausibly pled details about its damage.
 20 Unite's existing distributors threatened to stop selling Unite products because
 21 Walgreens.com impermissibly offered Unite products for online sale. *Id.* In addition,
 22 when Unite purchased samples of Unite products from Walgreens.com, it found that
 23

24 ² Walgreens' reference to the first-sale doctrine is an irrelevant non-sequitur of an
 25 affirmative defense, and not properly determined on a Fed. R. Civ. P 12(b)(6) motion.
 26 The first-sale doctrine provides a defense to copyright infringement, which Unite
 27 does not allege. The first-sale doctrine is not a defense to intentional interference
 28 with contractual relations. *Sebastian Int'l, Inc. v. Russolillo*, No. CV 00-3476 SVW
 (JWJx), 2005 U.S. Dist. LEXIS 45828, at *37-39 (C.D. Cal. Feb. 22, 2005) (first-sale
 doctrine did not bar hair-care product manufacturer's intentional interference with
 contractual relations claim relating to its efforts to stop its products from being resold
 through improper means).

1 the products were old and had lost much of their quality. *Id.* ¶ 17. Walgreens’
 2 actions damaged the significant goodwill that Unite has worked hard to earn. *Id.* ¶¶
 3 7, 9, 12-14, 25, 28. *Blizzard Entm’t Inc. v. Ceiling Fan Software LLC*, 28 F. Supp. 3d
 4 1006, 1016 (C.D. Cal. 2013) (damage to goodwill or reputation, and monetary harm,
 5 satisfies the damages prong of the test for intentional interference with contractual
 6 relations).

7 Walgreens’ uncontrolled online sales are very different from “UNITE sell[ing]
 8 certain of its products on its own website, but only with a carefully designed platform
 9 for consumers, including detailed self-education on each product, customer support
 10 contact ability, and the ability to ensure fresh product is shipped to purchasers.” FAC
 11 ¶12.

12 Each of these allegations are taken as true, despite Walgreens’ improper
 13 attempt to assert conflicting inferences and then ask the Court to resolve them against
 14 Unite. Thus, resulting damage has been plausibly pled, and Unite’s intentional
 15 interference claim should not be dismissed.

16 B. Unite Properly Pled its Unfair Competition Counts³

17 1. Unfair Competition Under 15 U.S.C. § 1125

18 Unite sufficiently pled facts showing that Walgreens violated 15 U.S.C. §
 19 1125. A party violates 15 U.S.C. § 1125 when it engages in conduct that is likely to
 20 deceive as to the “origin, sponsorship, or approval of his or her goods, services, or
 21 commercial activities by another person.”

22

23 ³ Walgreen argues in passing that Unite “shoehorns” three causes of action into a
 24 single claim. Unite alleged three counts: unfair competition under the Lanham Act,
 25 unfair competition under the common law, and unfair competition under Cal. Bus. &
 26 Prof. Code § 17200. Unite’s pleading supports each of these causes of action. It is
 27 clear that Walgreen understood the pleading, as it broke its argument out into three
 28 separate sections. Walgreen MTD at 9-11. This argument also fails, and in any event
 could only result in an order with leave to amend instructing the causes of action to
 be separated. *Carolina Cas. Ins. Co. v. Team Equip., Inc.*, 741 F.3d 1082, 1086 (9th
 Cir. 2014) (“A plaintiff should be permitted to amend a complaint to cure ‘technical’
 defects.”) (*citing Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (*en banc*)).

1 Here, Unite pled that it has a federally registered trademark, (FAC ¶ 8), that it
 2 sells through careful and limited authorized distribution channels (*id.* ¶ 10), that
 3 Walgreens' online sales are unauthorized and a prohibited channel, (*id.* ¶¶ 18, 23),
 4 that these sales are "likely to deceive consumers" as to the quality of UNITE products
 5 (because of their "unknown age or quality"), (*id.* ¶ 34), and are "injurious to
 6 consumers," (*id.* ¶ 32), thus constituting unfair competition. (*id.* ¶ 31). The sampling
 7 of Walgreens' UNITE products for sale online has shown they "were all of old
 8 products that had lost much of the quality that comes with products sold in a
 9 reasonable time period after production." *Id.* ¶ 17.

10 These allegations plausibly satisfy at least three separate avenues of unfair
 11 competition fitting within the express statutory language of Section 1125. First, these
 12 allegations support a claim for unfair competition as Walgreens' actions are likely to
 13 deceive consumers into believing that Walgreens' unauthorized online sales are in
 14 fact sponsored or approved by Unite. Second, these allegations also plausibly support
 15 the claim that consumers are likely to be deceived about the quality attributes of the
 16 Unite products (the "commercial activity by another person"), because the
 17 unauthorized sales are dumping old product of degraded quality into the marketplace.
 18 Third, Unite's resellers understand that Unite carefully controls the distribution of its
 19 products, and Walgreens is conveying a purported stamp of approval from Unite by
 20 offering Unite products online, harming the value of the Unite brand and Unite's
 21 relationships with its resellers.

22 Walgreens' actions as pled by Unite plausibly constitute unfair competition
 23 pursuant to 15 U.S.C. § 1125.

24 **2. Common Law Unfair Competition**

25 The tort of common law unfair competition encompasses a wide variety of
 26 unscrupulous business practices. For example, a company is liable for common law
 27 unfair competition if it has engaged in acts "analogous to 'passing off,' such as the

1 sale of confusingly similar products, by which a person exploits a competitor's
 2 reputation in the market." *Codexis, Inc. v. EnzymeWorks, Inc.*, 2016 U.S. Dist.
 3 LEXIS 106542, at *24 (N.D. Cal. Aug. 11, 2016) (citation omitted). While
 4 Walgreens' myopic arguments ignore it, tortious conduct such as interference with
 5 business relationships, disparagement of a competitor's goods, and competitive
 6 injury, also fall under the unfair competition umbrella. *Hewlett-Packard Co. v. Cigna*
 7 *Prop. & Cas. Ins. Co.*, 1999 U.S. Dist. LEXIS 20655, at *15-20 (N.D. Cal. Aug. 24,
 8 1999).

9 Here, Unite has plausibly stated a claim for intentional interference with
 10 contractual relations, and thus Walgreens' pleadings challenge to common law unfair
 11 competition fails.

12 Additionally, Unite alleged that Walgreens is impermissibly selling Unite
 13 products online. *See* FAC ¶ 28. The products being sold by Walgreens are old and
 14 stale. *Id.* Walgreens is deceiving consumers because consumers believe that they are
 15 purchasing products normally associated with Unite's reputation for quality, while
 16 the products they are actually buying are being sold outside of Unite's tightly-
 17 managed distribution chain that protects the freshness and quality of its products. *Id.*
 18 at ¶¶ 7, 9-14, 17, 28, 34, 36. Furthermore, Walgreens is diluting the Unite brand by
 19 selling old Unite products of lesser quality than those authorized by Unite. *Id.* at ¶
 20 36. Unite is also losing sales and its distributors and resellers are threatening to drop
 21 the brand because of Walgreens' malicious conduct. *Id.* at ¶ 19. Walgreens cannot
 22 establish as a matter of law the "fairness" of its competition, given the authorized
 23 distribution channels carefully created by Unite for its Unite brand products.

24 Unite has plausibly alleged common law unfair competition against Walgreens.

25 **3. Unfair Competition Under Cal. Bus. & Prof. Code § 17200**

26 Walgreens does not dispute that this claim is adequately stated if the intentional
 27 interference claim is plausibly pled. As intentional interference is plausibly pled,

1 Unite's Section 17200 claim is also plausibly pled. This satisfies the "unlawful"
2 prong of the Section 17200 claim, and thus, Unite has plausibly pled its Section
3 17200 claim.

4 **IV. CONCLUSION**

5 For the reasons stated, Walgreens' Motion to Dismiss should be denied.
6 Should the Court grant Walgreen's Motion to Sismiss any of Unite's claims, Unite
7 respectfully requests leave to amend. None of the asserted defects are incapable of
8 cure, particularly given that Walgreens continues to purchase and sell Unite products
9 even *after* receiving a copy of the relevant portions of the Distribution Agreement
10 with the First Amended Complaint.

11 Dated: October 7, 2016

12 MINTZ LEVIN COHN FERRIS GLOVSKY &
13 POPEO P.C.

14 By: s/Ben Wagner

15 Andrew D. Skale, Esq.
16 Ben L. Wagner, Esq.

17 Attorneys for Plaintiff
18 UNITE EUROTHERAPY, INC.

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CERTIFICATE OF SERVICE

I, the undersigned, certify and declare that I am over the age of 18 years, employed in the County of San Diego, State of California, and am not a party to the above-entitled action.

On October 7, 2016, I filed a copy of the following document:

UNITE EUROTHERAPY INC.'S OPPOSITION TO MOTION TO DISMISS

by electronically filing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Michael N. Cohen mcohen@cohenip.com,

Joshua H. Eichenstein jeichenstein@cohenip.com

Executed on October 7, 2016, at San Diego, California.

I hereby certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

s/ Ben L. Wagner

Ben L. Wagner, Esq.

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